Supreme Court, U.S.
FILED
APR 4 2002
OFFICE OF THE CLERK

(2)

No. 01-1272

IN THE

Supreme Court of the United States

MARK LEVY, Derivatively on behalf of ImmunoGen, Inc.,

Petitioner,

v.

SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD.

HERBERT TEITELBAUM
Counsel of Record
NOAH WEISSMAN
ROBINSON SILVERMAN PEARCE
ARONSOHN & BERMAN LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

Attorneys for Respondent
Southbrook International Investments, Ltd.

173302

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

279

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held that respondent Southbrook International Investments Ltd. ("Southbrook"), a holder of ImmunoGen, Inc. ("ImmunoGen") convertible preferred stock, was not a beneficial owner of more than 10% of ImmunoGen common stock, under Section 16(b) ("Section 16(b)") of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78p(b), because Southbrook's contractual right to convert preferred stock into common stock was limited to the extent that its common stock ownership would exceed 4.9% ("Conversion Cap").

2. Whether the Court of Appeals properly held, in accordance with *Auer v. Robbins*, 519 U.S. 452 (1997), that the Securities and Exchange Commission's ("SEC") interpretation of Rule 13d-3(d) is binding upon the court "unless [it is] 'plainly erroneous or inconsistent with the regulation[].' "

3. Whether the SEC exceeded its statutory authority in adopting Rule 13d-3(a) as the basis for defining the term "beneficial owner" contained in Section 16(b).

4. Whether the Court of Appeals properly affirmed the District Court's holding that the Conversion Cap does not violate either (i) the "sham transaction" doctrine because it is a legitimate means of structuring a transaction so as not to violate Section 16(b) or (ii) Section 29(a) of the Exchange Act because it does not waive compliance with the Exchange Act.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Southbrook International Investments Ltd., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
Reasons for Denying the Writ	6
I. The Second Circuit's Decision Does Not Conflict with Decisions of This Court	6
A. The Second Circuit's Decision Does Not Conflict With This Court's Precedent on Statutory Interpretation	6
B. The Second Circuit's Decision Does Not Conflict with This Court's Decisions on the Deference To Be Afforded an Agency's Interpretation of Its Own Rules In an *Amicus* Brief	9
II. The Second Circuit's Decision Does Not Conflict With Decisions of Other Courts of Appeals	12

Contents

Page

A. The Deference Standard Identified By The Second Circuit Does Not Conflict With A Decision of the Seventh Circuit 12

B. The Second Circuit Decision Does Not Conflict With Decisions in Other Circuits on the Issue of Sham Transactions 13

III. The Second Circuit's Decision Does Not Raise Issues of National Importance 14

A. The Second Circuit's Decision Does Not Conflict With Section 29(a) of the Exchange Act 14

B. SEC Rule 13d-3 Is Not Inconsistent With Section 16(b) 15

Conclusion 17

Appendix — Brief Of The Securities And Exchange Commission, Amicus Curiae, In Support Of Appellee On Issues Addressed 1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Atchison, Topeka & Santa Fe Railway Co. v. Pena,
44 F.3d 437 (7th Cir. 1994) 12, 13

Auer v. Robbins,
519 U.S. 452 (1997) ..... i, 10, 11, 12

Bershad v. McDonough,
428 F.2d 693 (7th Cir. 1970) 13

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 10

Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.,
467 U.S. 837 (1984) 10

Connecticut Nat'l Bank v. Germain,
503 U.S. 249 (1992) 6

Foremost-McKesson, Inc. v. Provident Sec. Co.,
423 U.S. 232 (1976) ..... *passim*

Gollust v. Mendell,
501 U.S. 115 (1991) 16

Harsco Corp. v. Segui,
91 F.3d 337 (2d Cir. 1996) 15

Kern County Land Co. v. Occidental Petroleum Corp.,
411 U.S. 582 (1973) 6

Cited Authorities

Page

McMahan & Co. v. Wherehouse Entm't, Inc.,
65 F.3d 1044 (2d Cir. 1995) 15

Press v. Quick & Reilly, Inc,
218 F.3d 121 (2d Cir. 2000) 9

Reliance Elec. Co. v. Emerson Elec. Co.,
404 U.S. 418 (1972) 11, 14

Riseman v. Orion Research, Inc.,
749 F.2d 915 (1st Cir. 1984) 13

Roberston v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 10

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 11

United States v. Mead Corp.,
533 U.S. 218 (2001) 10, 11

Federal Statutes:

15 U.S.C. § 78cc(a) ..... *passim*

15 U.S.C. § 78p(b) ..... *passim*

17 C.F.R. 240.13d-3 ..... *passim*

17 C.F.R. 240.13d-3(a) i

Cited Authorities

	Page
17 C.F.R. 240.13d-3(d)	3
17 C.F.R. 240.13d-3(d)(1)(i)	7
17 C.F.R. 240.13d-5(b)(1)	7
Fed. R. Civ. P. 12(b)(6)	3
Secondary Sources:	
Filing and Disclosure Requirements Relating to Beneficial Ownership, Securities Exchange Act of 1934, Release No. 14692, 1978 SEC LEXIS 1716 (April 21, 1978)	8

STATEMENT OF THE CASE

Respondent Southbrook entered into a convertible preferred stock purchase agreement ("Convertible Agreement"), dated as of October 16, 1996, with ImmunoGen, for the purchase of ImmunoGen preferred stock ("Preferred Stock"). The Convertible Agreement provided Southbrook with a right to convert the Preferred Stock into ImmunoGen common stock ("Common Stock") and to exercise certain warrants to purchase Common Stock.

Southbrook's rights were expressly limited by the Conversion Cap in the Convertible Agreement. The Conversion Cap prohibits Southbrook from converting any shares of Preferred Stock or exercising any of its warrants to the extent that the conversion would result in Southbrook owning more than 4.9% of the outstanding shares of the Common Stock:

> The Purchaser may not use its ability to convert [Preferred Stock] hereunder or under the terms of the Vote Certificates or to exercise its right to acquire shares of Common Stock under the Warrants to the extent that such conversion or exercise would result in the Purchaser owning more than 4.9% of the outstanding shares of the Common Stock.

(Section 3.10 of the Convertible Agreement (J. A. at A-36[1]).)

The Conversion Cap's restrictions on Southbrook's right to convert were reiterated in key documents. Each certificate

1. Citation to "J. A." refers to the Joint Appendix filed by the parties before the Federal Court of Appeals for the Second Circuit.

evidencing Preferred Stock ("Convertible Certificate") contained a legend stating that it was subject to this Conversion Cap. The Conversion Cap also is reflected in the certificate of designation ("Certificate of Designation") for each class of Preferred Stock. As well, these restrictions were fully disclosed in various filings by ImmunoGen with the SEC under the Securities Act of 1933 and the Exchange Act, and in ImmunoGen's 1997 proxy statement for its annual stockholders meeting. (J. A. at A-135 - 347.)

At various times, Southbrook exercised its conversion rights, converting Preferred Stock into Common Stock. Southbrook also sold Common Stock. It was undisputed that Southbrook, consistent with the Conversion Cap, never acquired actual ownership of more than 4.9% of ImmunoGen Common Stock, much less the 10% threshold required to trigger Section 16. Also undisputed is that Southbrook never, at any time, had the power to acquire, vote, direct the voting of, dispose of, or direct the disposition of, more than 4.9% of ImmunoGen Common Stock.

After Southbrook's conversions and sales, Petitioner requested that Respondent ImmunoGen institute an action, pursuant to Section16(b), to require Southbrook to disgorge any alleged short-swing profits it earned from its investment in ImmunoGen Preferred Stock. After analyzing Petitioner's request, ImmunoGen, upon whose behalf Petitioner purports to act, declined. This derivative action ensued against Southbrook, pursuant to Section 16(b). Section 16(b) imposes strict liability upon investors that beneficially own more than 10% of a company's stock, requiring disgorgement of profits earned on purchases and sales of the securities that occur within a six-month period.

Southbrook moved, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the action. Southbrook explained that it was never at any time an actual owner and, as a result of the Conversion Cap, was never a beneficial owner of more than 10% of ImmunoGen Common Stock. Without the right to acquire more than 10% of the Common Stock at any time, including the 60 day period referenced in Rule 13d-3(d), Southbrook contended it was never a 10% beneficial owner of the Common Stock.

While Petitioner conceded that Southbrook adhered to the Conversion Cap's limitations and had not owned more than 4.9% of the Common Stock, it argued, in its opposition to the motion, that Southbrook should be deemed the beneficial owner of all the Common Stock it could acquire and dispose of, under the Convertible Agreement, through *seriatim* conversions and sales. Petitioner urged the District Court to equate 10% beneficial ownership with the power to buy relatively small blocks of stock over 60 days, if the purchases, when aggregated without regard to the sales, added up to more than 10% of the Common Stock. Thus, under Petitioner's view, Section 16(b) would apply even though an investor never at any point, within 60 days or otherwise, exceeded or had the right to exceed the statutory threshold. In addition, Petitioner argued that the Conversion Cap was void either under the Seventh Circuit's "sham transaction" doctrine or pursuant to Section 29(a) of the Exchange Act.

The United States District Court for the Southern District of New York granted Southbrook's motion to dismiss, and Petitioner appealed to the United States Court of Appeals for the Second Circuit. Following oral argument, the Second Circuit requested that the SEC submit an *amicus curiae* brief addressing, among other issues, how the Commission

interprets Rule 13d-3. Specifically, the Second Circuit invited the SEC to present its view as to whether, under Rule 13d-3, an investor that holds a convertible security may be a 10% beneficial owner of the underlying common stock, despite the existence of a 4.9% conversion cap. In its *amicus* brief, the SEC advocated that the Second Circuit affirm the District Court's ruling that a valid and binding 4.9% conversion cap prevents the investor from being, by virtue of its conversion rights, a beneficial owner of more than 4.9% of the Common Stock. (*Brief of the Securities and Exchange Commission, Amicus Curiae, In Support Of Appellee On Issues Addressed* ("*Amicus*"), dated March 2001, at 12.)[2]

According to the SEC, Rule 13d-3 defines beneficial ownership to include only voting and investment power over a security, or the "right" to acquire that security within sixty days. (*Amicus* at 17-18.) The SEC pointed out that Southbrook's right to acquire Common Stock through conversion was limited by the Conversion Cap: once Southbrook owned 4.9% of the Common Stock, the Conversion Cap prevented it from converting any more Preferred Stock. (*Id.* at 20-21.) At that point, Southbrook would have no "right" to acquire more shares unless it first divested itself of all or part of its existing holdings. (*Id.* at 21-22.) The SEC explained further that Southbrook would cease to have either voting or investment power over the divested securities within the meaning of SEC regulations. (*Id.*)

While the SEC acknowledged that an investor who could dispose serially of large amounts of stock "may be in

2. For the Court's convenience, Southbrook has lodged 11 copies of the *Amicus* with the clerk's office of the United States Supreme Court.

a position to exert influence over the company, that general observation does not displace the clear language of Rule 13d-3." (*Id.* at 12.) The SEC noted that "it would be especially inappropriate to expand that language in the context of Section 16, which the Supreme Court has long held should be construed narrowly because it is a strict liability statute." (*Id.* at 12-13.) The SEC concluded that a 4.9% conversion cap, if valid and binding, prevents the holder of a convertible security from becoming a beneficial owner of more than 4.9% of the underlying stock. (*Id.* at 24.)

The Second Circuit affirmed the District Court's judgment, and thereafter, denied a petition for *en banc* review. The Court rejected Petitioner's *seriatim* conversion argument and his argument to declare the Conversion Cap void under the "sham transaction" doctrine and Section 29(a) of the Exchange Act. In holding that Southbrook could not be the beneficial owner of more than 4.9% of the Common Stock because "it does not have the 'right to acquire' more than 4.9% of ImmunoGen common stock 'within sixty days' of each divestment," the Second Circuit analyzed the plain language of Section 16(b), Rule 16a-1, Section 13(d), and Rule 13d-3, as well as this Court's holding in *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232 (1976). The SEC's view, as expressed in its *amicus* brief and Releases, also was considered by the Court: "[b]ecause the SEC's position is neither plainly erroneous nor inconsistent with the regulations *and comports with our interpretation*, we adopt it." (Op. at A-11[3] (emphasis added).)

---

3. Citation to "Op." refers to the opinion below of the United States Court of Appeals for the Second Circuit attached as an appendix to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. The Second Circuit's Decision Does Not Conflict with Decisions of This Court

A. The Second Circuit's Decision Does Not Conflict With This Court's Precedent on Statutory Interpretation

Petitioner argues that the Second Circuit disregarded this Court's precedent on statutory interpretation, which states that "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " (Pet. at 5, quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).) In particular, Petitioner contends that the Second Circuit's analysis of "beneficial ownership" under Section 16(b) improperly considered Congress' purpose in adopting Section 16(b). Petitioner's argument misconstrues both this Court's admonition regarding the application of Section 16(b), and the Second Circuit's analysis.

This Court repeatedly has admonished that Section 16(b) and its regulations must be construed narrowly with consideration given to Congress' purpose in enacting the statute. In *Kern County Land Co. v. Occidental Petroleum Corp.*, this Court instructed that before imposing Section 16(b) liability on a transaction, a court must "inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent . . . thereby endeavoring to implement congressional objectives without extending the reach of the statute beyond its intended limits." 411 U.S. 582, 594-595 (1973). In *Foremost-McKesson*, this Court cautioned against adopting an approach to Section 16(b) liability "that is not consistent with the premises upon which

Congress enacted the section." 423 U.S. at 243. Accordingly, the Second Circuit's decision followed Supreme Court precedent on statutory interpretation by considering in its analysis of beneficial ownership Congress' purpose in enacting Section 16(b).

Petitioner also contends that the Second Circuit misconstrued the policy underlying the "within sixty days" provision contained in Rule 13d-3's definition of beneficial ownership. Petitioner argues that the Second Circuit improperly focused on "the right to acquire the ability to control" within 60 days, as opposed to focusing on the ability of Southbrook to "affect control" through *seriatim* conversions of small blocks of Preferred Stock over sixty days.[4] (Pet. at 7.) Petitioner's argument misrepresents the SEC's reason for including the "within sixty days" limitation in Rule 13d-3 and the Second Circuit's analysis of this Rule.

As the SEC explained in its Release issued in 1978 ("1978 Release"), Rule 13d-3(d)(1)(i) deems a person to be a beneficial owner of a security if he has the " 'right to acquire beneficial ownership of such security, at any time within sixty

4. Petitioner does not raise a valid issue to the extent he is arguing that Southbrook should be deemed the beneficial owner of more than 10% of the Common Stock because it could "affect control" by serially converting small blocks of Preferred Stock into Common Stock, and then transferring those small blocks of Common Stock to a single investor who would eventually amass a 10% block of Common Stock. Rule 13d contains a "group" theory of liability, which deems an investor the beneficial owner of transferred stock only if it and the transferee "agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer. . . ." 17 C.F.R. 240.13d-5(b)(1). There was no claim that such transfers occurred or that such a "group" agreement existed between Southbrook and some third party.

days, through: . . . conversion of a convertible security. . . .' " *Filing and Disclosure Requirements Relating to Beneficial Ownership*, Securities Exchange Act of 1934, Release No. 14692, 1978 SEC LEXIS 1716, at *14 (April 21, 1978). The 1978 Release explains that "when sixty days or less are left until the right to acquire may be exercised . . . the ability of the holder of such right to affect control is sufficient to warrant the imposition of . . ." insider status. *Id.* at *15. The corollary to this principle is that "as the point in time in which the right to acquire may come to fruition is extended into the future the relation of the right's ability to influence control is correspondingly attenuated." *Id.*

The Second Circuit recognized both of these principles in its analysis of Petitioner's *seriatim* conversion theory. The Court first noted that the right to acquire control of a large block of stock within 60 days conferred on the investor "the power over corporate affairs associated with significant equity ownership," which "implicates access to inside information and the potential for insider trading." (Op. at A-10.) After correctly quoting from the 1978 Release, the Court went on to explain that the 1978 Release establishes that, in incorporating the "within sixty days" provision, the SEC "was contemplating a time limitation in connection with the right to acquire the ability to control." (Op. at A-10.)

Insider status would be irrefutably conferred, as a matter of law, only where the right to acquire the Common Stock through conversion could result in Southbrook owning a 10% block of Common Stock within 60 days. (*Id.*) The "within sixty days" provision is not a direction to aggregate serial purchases (and ignore any sales) over 60 days. That notion finds no support in the language of Section 16(b) or Rule 13d, relevant legislative history or the

precedents of this Court. Rather, the "within sixty days" provision is an acknowledgment that an investor who has the "right to acquire" a 10% block of stock within a short period may have the ability to "affect control" and, correspondingly, have access to inside information.

The Second Circuit did not ignore the issue of whether Southbrook had the ability to "affect control" by its "right to acquire" Common Stock through conversion, as Petitioner contends. The Court simply found that Southbrook did not have the ability to "affect control" through serial conversions because the Conversion Cap prevented Southbrook from having "the 'right to acquire' more than 4.9% of ImmunoGen common stock 'within sixty days' of each divestment." (Op. at A-11.) The Second Circuit analysis comports with the purpose of the "within sixty days" provision, and the SEC's interpretation of its own Rule supports the Second Circuit's view. Both adhere to this Court's instruction that Section 16(b) operates only "within narrowly drawn limits." (*Id.* quoting *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 251 (1976).)

B. The Second Circuit's Decision Does Not Conflict with This Court's Decisions on the Deference To Be Afforded an Agency's Interpretation of Its Own Rules In an *Amicus* Brief

Petitioner also argues that the Second Circuit applied the wrong standard in determining the level of deference to be given the SEC's interpretation of its own rules. According to Petitioner, the Second Circuit should not have applied the deference standard set forth in *Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 128 (2d Cir. 2000), which, in turn, is based upon the deference standard set forth by this Court in

Auer v. Robbins, 519 U.S. 452 (1997).[5] Petitioner contends that the Second Circuit should have undertaken the analysis employed by this Court in *United States v. Mead Corp.*, 533 U.S. 218 (2001), to determine the appropriate level of deference. The bases of the Second Circuit's opinion is mischaracterized by Petitioner, and the deference standard Petitioner advocates is, under the circumstances of this case, incorrect.

While the Second Circuit recites the *Auer* deference standard and notes that the SEC's *amicus* "supports [Southbrook's] reading of [Rule 13d-3]," the Second Circuit also made clear that it had independently analyzed the Rule and determined that the SEC's position "comports with our interpretation. . . ." (Op. at A-11.) The Petitioner completely ignores this portion of the opinion.

Even assuming the Second Circuit did not conduct its own analysis, it set forth the appropriate deference standard. The *Auer* standard is to be applied to circumstances, as here, where an agency interprets its own rules. 519 U.S. at 462 (holding that where the rule at issue "is a creature of the [agency's] own regulations, [the agency's] interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation' "); *see also Roberston v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (same); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (same). In contrast, *Mead Corp.*, concerned rulings issued by the United States

5. Contrary to Petitioner's contentions, the Second Circuit did not apply the deference standard from *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984), which properly is applied to an administrative agency's interpretation of an ambiguous statute that it administers. *Id.* at 842-843.

Customs Service, which Congress did not intend to have the force of law. 533 U.S. at 232. Thus, these rulings were held not to be entitled to the level of deference mandated by *Auer*. *Id.* at 220-228; *see also Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (considering the level of deference to be afforded Fair Labor Administrator's informal bulletins and rulings). Petitioner's argument based on *Mead Corp.*, is inapposite.

Equally unavailing is Petitioner's argument that this Court's decisions in *Foremost-McKesson* and *Reliance Electric Co. v. Emerson Electric Co.* require a different deference standard. In those cases, the Court rejected the SEC's interpretation of Section 16(b), because "the SEC's own rules undercut such interpretation" and the SEC's interpretation "not only strain[ed], but flatly contradict[ed], the words of the statute." *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 427-28 (1972); *see Foremost-McKesson*, 423 U.S. at 260. The SEC in this case was neither interpreting a congressional statute (in which case, its view would be afforded less deference), nor was it advocating an interpretation that is contradicted by the statute's words or the Commission's rules. As discussed above, the SEC's view as expressed to the Second Circuit was clearly supported by the 1978 Release and by this Court's interpretation of Section 16(b) and Section 13(d).

Petitioner also argues that it is a violation of the Constitution's Separation of Powers doctrine for the judiciary to afford binding deference to the SEC's interpretation of its rules. Petitioner ignores that the Second Circuit reached an independent decision based on its own analysis of the SEC rule at issue and adopted the SEC's view because it comported with the Court's own view. Nevertheless,

assuming the Second Circuit merely applied the *Auer* standard, it did not abdicate complete authority to the SEC to interpret its own rules. The Court, under the *Auer* standard, still would have to evaluate whether the SEC's view was "plainly erroneous or inconsistent with the regulations." If the SEC's interpretation of the rule failed to meet that standard, the Second Circuit would not have endorsed it. The Second Circuit never relinquished its judicial authority to the SEC.

II. The Second Circuit's Decision Does Not Conflict With Decisions of Other Courts of Appeals

A. The Deference Standard Identified By The Second Circuit Does Not Conflict With A Decision of the Seventh Circuit

Petitioner argues that the Second Circuit's decision conflicts with a decision in the Seventh Circuit, which supposedly held that an administrative agency's interpretation of its rules, 23 years after the rule was promulgated, is not entitled to deference. *See Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 442 (7th Cir. 1994). Once again, Petitioner ignores that the Second Circuit conducted its own analysis of Rule 13d-3 and adopted the SEC's interpretation because it comported with the Court's own view. The deference standard, therefore, is irrelevant.

But even if the deference standard were relevant, the Second Circuit's decision does not conflict with *Atchison*. In that case, the Seventh Circuit was analyzing "interpretive rules," which are rules issued by an agency that lacks rule-making authority. The Seventh Circuit concluded that interpretative rules are not entitled to the same level of

deference granted to agency rules promulgated by an agency with rule-making authority. *Id.* The *Atchison* Court ultimately afforded the agency's view of its "interpretive rules" no deference because, in addition to applying a lower deference standard, it found that the agency's view was a "post-hoc rationalization," which was "inconsistent with twenty-three years of agency enforcement," and unsupported by "administrative document[s] . . . issued contemporaneously with the passage of the statute." *Id.* at 442. No such finding can legitimately be made here, and unlike the agency in *Atchison*, the SEC has rule-making authority.

B. The Second Circuit Decision Does Not Conflict With Decisions in Other Circuits on the Issue of Sham Transactions

Petitioner also argues that a Seventh Circuit decision and a First Circuit decision conflict with the Second Circuit's rejection of Petitioner's argument that the Conversion Cap is void under the "sham transaction" doctrine. Neither the Seventh nor First Circuit has held that conversion caps represent sham transactions.

Under the "sham transaction" doctrine, an investor will be deemed the beneficial owner of stock, regardless of the form of the underlying transaction, if the essential rights of ownership of the underlying stock have been passed to the investor. *Bershad v. McDonough*, 428 F.2d 693, 697-98 (7th Cir. 1970) (finding "sham transactions" where shares referenced in option were endorsed in blank for transfer to option holder, option holder received irrevocable proxy to vote shares, and option holder's board nominees replaced that of option issuer); *cf. Riseman v. Orion Research, Inc.*, 749 F.2d 915, 921 (1st Cir. 1984) (holding that an investor

shall be deemed to have purchased common stock where investor held option that created irrevocable obligation to receive common stock although formalities to stock transfer had not yet occurred).

The Conversion Cap in this case does not resemble the sort of transaction that falls within the reach of the "sham transaction" doctrine. Nor is Section 16(b) liability triggered simply by the fact that Southbrook and ImmunoGen sought to structure their transaction to avoid application of that doctrine. This Court has held that "[l]iability cannot be imposed simply because the investor structured his transaction with the intent of avoiding liability under § 16(b)." *Reliance Elec.*, 404 U.S. at 422. That is precisely the circumstance here, as the Second Circuit pointed out.

III. The Second Circuit's Decision Does Not Raise Issues of National Importance

A. The Second Circuit's Decision Does Not Conflict With Section 29(a) of the Exchange Act

Petitioner argues that the Conversion Cap raises issues of national importance because it conceals material facts from investors and violates Section 29(a) of the Exchange Act. First, the details of Southbrook's transaction, including the Conversion Cap, were fully disclosed in various filings by ImmunoGen with the SEC under the Securities Act of 1933 and Exchange Act, as well as in ImmunoGen's 1997 proxy statement for its annual stockholders meeting. (*See e.g.* ImmunoGen Form 10-Q for the quarterly period ending September 30, 1996 (J. A. at A-242-328); ImmunoGen Proxy Statement, dated Oct. 10, 1997, at 3 Fn. 4 (J. A. at A-333).)

Second, Section 29(a) is inapplicable, as the District Court held and the Second Circuit affirmed. Section 29(a) provides that "[a]ny condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulations thereunder . . . shall be void." 15 U.S.C. § 78cc(a). Courts apply this section when the parties to a transaction that violates the law expressly waive compliance with the violated law. *E.g. Harsco Corp. v. Segui*, 91 F.3d 337 (2d Cir. 1996) (holding stipulation void that waives compliance with Exchange Act); *cf. McMahan & Co. v. Wherehouse Entm't, Inc.*, 65 F.3d 1044, 1050-51 (2d Cir. 1995) (holding provision void that expressly waived "substantive rights under the securities laws"). There is no agreement in this case providing that Southbrook may own more than 10% of the Common Stock and not report it under Sections 16(a) or 13(d), or that Southbrook would not be liable for short-swing trading under Section 16(b). The Conversion Cap merely prevents Southbrook from owning more than 4.9% of the Common Stock.

B. SEC Rule 13d-3 Is Not Inconsistent With Section 16(b)

Petitioner argues that if the Second Circuit's interpretation of Rule 13d-3 is correct, it is inconsistent with Section 16(b)'s purpose. The SEC, Petitioner contends, therefore, exceeded its authority to promulgate rules pursuant to Section 3(b) of the Exchange Act by adopting Rule 13d-3's definition of beneficial ownership for Section 16(b). Rule 13d-3's definition of beneficial ownership and the Second Circuit's interpretation of that rule are entirely consistent with Section 16(b)'s purpose.

This Court has explained that "Congress passed § 16(b) of the 1934 Act to 'preven[t] the unfair use of information which may have been obtained by [a] beneficial owner, director, or officer by reason of his relationship to the issuer.'" *Gollust v. Mendell*, 501 U.S. 115, 122 (1991). "Prohibiting short-swing trading by insiders with nonpublic information was an important part of Congress' plan. . . ." *Id.* To eliminate such trading, Section 16(b) "imposes a form of strict liability on" certain statutory insiders. *Id.* at 123.

Because the statute imposes strict liability without regard to fault, Congress fixed " 'narrowly drawn limits' on the class of corporate insiders who may be defendants under Section 16(b)." *Id.* A narrow construction of the statute is required "even though in some cases a broader view of statutory liability could work to eliminate an 'evil that Congress sought to correct through Section 16(b).' " *Id.* For this reason, insider status coupled with the irrebutable presumption of insider trading would be imposed upon Southbrook only where it has had the right to acquire, both at the purchase and the sale in question, a 10% block of the Common Stock within 60 days. *See id.*

Southbrook could not assemble, within 60 days or at any other time, a block of stock large enough to exceed the threshold Congress set as justifying Section 16(b)'s presumption of trading on inside information. Accordingly, a definition of beneficial ownership that presumes possession of inside information based on the right to acquire a 10% block of common stock within sixty days, as opposed to the ability to trade actively in small blocks of stock, adheres to Congress' purpose. As this Court held in *Foremost-McKesson*, "trading by mere stockholders was viewed [by Congress] as being subject to abuse only when the size

of their holdings afforded the potential for access to corporate information." 423 U.S. at 253. The SEC did not exceed its authority in promulgating Rule 13d-3.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HERBERT TEITELBAUM
Counsel of Record
NOAH WEISSMAN
ROBINSON SILVERMAN PEARCE
ARONSOHN & BERMAN LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

Attorneys for Respondent
Southbrook International Investments, Ltd.

APPENDIX

APPENDIX — BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, IN SUPPORT OF APPELLEE ON ISSUES ADDRESSED

[Omitted here but submitted separately as Lodging]